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Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

ALICE ORSINI, o/b/o
MEGAN R. ORSINI
Petitioner

v.

LOUIS W. SULLIVAN,
Secretary of Health
and Human Services,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

IS THE EQUAL PROTECTION COMPONENT OF THE FIFTH AMENDMENT VIOLATED WHEN A POSTHUMOUS ILLEGITIMATE CHILD WHO HAS BEEN CONCLUSIVELY ESTABLISHED BY THE HLA TEST AS THE BIOLOGICAL CHILD OF A DECEASED INSURED WAGE EARNER IS DENIED CHILD SURVIVOR'S BENEFITS UNDER THE SOCIAL SECURITY ACT DUE TO HER FAILURE TO MEET "DEPENDENCY" OR "SUPPORT" REQUIREMENTS OF THE STATUTE WHICH ARE NOT REQUIRED OF LEGITIMATE CHILDREN.

LIST OF PARTIES TO THIS PROCEEDING

Petitioner Alice Orsini on behalf of Megan R. Orsini, Petitioner

Louis W. Sullivan, Secretary of Health and Human Services, Respondent

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The Petitioner, Alice Orsini, on behalf of Megan R. Orsini, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on June 22, 1990.

OPINIONS BELOW

The United States Court of Appeals for the Eleventh Circuit entered its opinion of affirmance on June 22, 1990. The opinion of the United States Court of Appeals is cited Orsini on behalf of Orsini v. Sullivan, 903 F.2d 1393 (11th Cir. 1990) and is reprinted in Appendix A to this Petition.

The opinion of the United States Court of Appeals affirmed the decision of the United States District Court dated January 20, 1989. The decision of the United States District Court is reprinted in Appendix B to this Petition.

The decision of the United States District Court adopted the Report and Recommendation of the United States Magistrate dated December 14, 1988. The Report and Recommendation of the United States Magistrate is reprinted in Appendix C to this Petition.

The Report and Recommendation of the United States Magistrate affirmed the decision of the Appeals Council of the Department of Health and Human Servies dated July 18, 1986. A copy of the decision is reprinted in Appendix D to this Petition.

The decision of the Appeals Council affirmed its earlier decision dated August 7, 1986. A copy of the decision is reprinted in Appendix E to this Petition.

The decision of the Appeals Council affirmed the decision of the Administrative Law Judge denying Petitioner's claim dated April 21, 1986.

The decision of the Administrative Law Judge is reprinted in Apprendix F to this Petition.

JURISDICTION

The opinion of affirmance of the United States Court of Appeals for the Eleventh Circuit was entered on June 22, 1990. The jurisdiction of this Court rests on 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Equal Protection component of the Due Process Clause of the Fifth Amendment to the United States Constitution reprinted in Appendix G to this petition. This case also involves 42 U.S.C. Section 402(d)(1)(C)(ii), 42 U.S.C. Section 416(e), 416(h)(2)(3) and 416(h)(3)(C)(ii) reprinted in Appendix H to this petition.

STATEMENT OF THE CASE

The United States District Court had jurisdiction under 42 U.S.C. 405(g).

The Petitioner, Alice Orsini, applied for Social Security Child Survivor's benefits on behalf of her infant daughter, Megan Orsini, in October, 1984. Megan Orsini's father, Michael Orsini, died on January 2, 1984, a fully insured wage earner under Social Security. Alice and Megan Orsini acquired the Orsini name through a name change proceeding after Michael's death. Child Survivor benefits were denied initially and upon reconsideration because Megan Orsini, as an illegitimate child, failed to meet any of the "dependency" or "support" requirements of the Social Security Act, 42 U.S.C. Section 416(h)(3)(C)(ii).

The reason Megan Orsini failed to meet any of the support requirements was the fact that her father died

approximately one week after she was conceived. Alice Orsini had a positive pregnancy test on January 24, 1984, three weeks after Michael Orsini's death. Michael Orsini died before he knew or could have known he was going to be Megan's father.

After the denial of benefits Alice and Megan Orsini and Michael Orsini's family (at the Orsini family's expense) participated in Human Leukocyte Antigen (HLA) testing at Johns Hopkins University School of Medicine resulting in a finding that Michael Orsini's probability of paternity of Megan was 99.8%.

Alice Orsini then timely requested review through the Social Security Administration's hearing process. The Administrative Law Judge in a decision dated April 21, 1986 ruled that, although Megan was the biological child of Michael Orsini, she did not qualify, on his

earnings record, for survivor's benefits because she did not meet the aforementioned dependency or support requirement. The government has maintained the position that Michael Orsini's conclusively established paternity of Megan Orsini is irrelevant to the consideration of her claim for benefits through the Appeals Council, review by the Federal District Court for the Middle District of Florida and in the Eleventh Circuit Court of Appeals, thus far successfully.

Throughout the lengthy process of hearing and appeals in this case, Petitioner has urged the various tribunals to construe the "support" requirements as not requiring actual support by Michael Orsini because a one-week-old fetus requires no support. This line of reasoning, Petitioner posited, is consistent with the cases in which support

for posthumous illegitimate children need only be consistent with the fetus or child's needs at the time the father died. This has been rejected.

The Petitioner has further urged that the Equal Protection component of the Fifth Amendment is violated by requiring the Petitioner, conclusively a biological child, to prove dependency when legitimate children are not required to do so. This argument is predicated upon the assumption that the dependency and support requirements of illegitimate children are solely for the purpose of screening out "spurious" claims, which is manifestly not necessary for those children, such as the Petitioner, who are established as actual children by the HLA test.

The Eleventh Circuit Court of Appeals rejected this contention, holding that the Supreme Court's ruling in Matthews v. Lucas, 427 U.S. 495, 96 S.Ct. 2755, 49

L.Ed.2d 651 (1976), is controlling on this question. Petitioner contends otherwise and this petition for certiorari ensued.

REASONS FOR GRANTING THE WRIT

1. THE UNITED STATES COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The pertinent sections of the Social Security Act providing for Child Survivor's benefits were initially enacted in 1956 (see Appendix H) and have historically been regarded as the primary vehicle chosed by Congress for providing for the surviving dependents of deceased workers. The provisions of this law are considered by Congress and the American people to be an integral part of the social "safety net" envisioned by the original architects of the Social Security Act. These benefits are a major factor in any family's estate and insurance planning.

Historically as well, Congress and the Courts have grappled with the question of the status of illegitimate children of

deceased wage earners under the Act, ultimately arriving at a hierarchy of proof of paternity and dependency required to establish entitlement to benefits. Legitimate children are required to establish nothing but the fact of their parents' marriage. Illegitimate children who have been determined by a court of competent jurisdiction to be a deceased wage earner's child need only provide the court order. Other illegitimate children are required to select among a variety of proof mechanisms to establish "dependency" upon the deceased wage earner, a fact which is simply presumed regarding legitimate children. Ultimately, if no other appropriate documentation which meets the statutory criteria is available, the illegitimate child can establish entitlement by showing evidence satisfactory to the Agency that the wage earner was "living with or supporting" the

child (or fetus in the case of posthumous children) at the time of death.

Unavoidably, challenges to the constitutionality of these distinctions between legitimate and illegitimate children have arisen and the statute has clearly survived such attacks, most specifically in Mathews v. Lucas, 427 U.S. 495, 96 S.Ct. 2755, 49 L.Ed.2d 652 (1976). in which Justice Blackmun for the majority, in essence, held that the pertinent provisions were an administratively convenient and reliable method of determining the validity of many thousands of such claims. Although the statute did treat illegitimate children differently, the opinion spoke approvingly of the "narrow set of objective and apparently reasonable indicators" contained in the statutory classifications.

In the instant case, the Eleventh Circuit Court of Appeals, in finding Megan

Orsini's admittedly proven daughter-father relationship with Michael Orsini to be effectively irrelevant, ruled that the Supreme Court had already directly considered Petitioner's Equal Protection argument in Mathews v. Lucas and had explicitly rejected that argument.

The Petitioner contends, to the contrary, that Mathews v. Lucas is not controlling and does not therefore dictate a result in her case. Mathews v. Lucas does not even mention the HLA test and that fact can probably be attributed in part to the relative novelty of the HLA procedure in 1976 when Mathews v. Lucas was decided. Also importantly, Petitioner in the instant case does not challenge the essential constitutionality of the entire statutory classification, as was the case in Mathews v. Lucas. Rather, she challenges on Equal protection grounds the premise that a scientifically proven

biological child is not entitled the equivalent presumption of dependency accorded a legitimate child when the various dependency and support provisions are present in the law only to determine if the applicant is the child of the wage earner.

It is manifestly clear that Congress crafted the dependency and support requirements of the Act in order to provide an administratively convenient method of weeding out spurious claims. Jimenez v. Weinberger, 417 U.S. 628, 41 L.Ed.2d. 363, 94 S.Ct. 2496 (1974) and Mathews v. Lucas.

This Court has specifically rejected any reading of this statute as providing for only replacement of support actually enjoyed prior to qualification for benefits. Jimenez v. Weinberger.

Clearly the absence of any actual requirement of support paid by deceased

wage earners to children born in wedlock supports the common sense view that the dependency and support requirements are thought necessary to address only what the court has elsewhere referred to as the "lurking problems with respect to proof of paternity". Gomez v. Perez, 409 U.S. 535, 35 L.Ed.2d 56, 92 S.Ct. 872, (1973); Clark v. Jeter, 486 U.S. 456, 100 L.Ed.2d 465, 108 S.Ct. 1910, (1988).

Petitioner contends that the statutory classification operates to allow other illegitimate children to prove by indirect, circumstantial and even anecdotal evidence of often dubious probative value that which Megan Orsini has proven by highly reliable, effectively conclusive scientific evidence. The anomaly is, of course, that the other children might succeed; Megan Orsini and others similarly situated cannot succeed. They have an impenetrable barrier in the

form of the dependency/support requirements.

Petitioner contends, specifically, that the Equal Protection component contained in the Fifth Amendment Due Process Clause prohibits discriminatory treatment of her as an illegitimate child without a substantial governmental interest being served.

It is axiomatic that illegitimate children are entitled to "intermediate" or "middle tier" scrutiny under the Equal Protection component of legislative and regulatory classifications based upon their illegitimate status. It is also axiomatic that intermediate scrutiny requires that such legislative or regulatory distinctions must be substantially related to achieving an important governmental objective. Mills v. Habluetzel, 456 U.S. 91, 99, 71 L.Ed.2d 770, 102 S.Ct. 1549 (1982);

Mathews v. Lucas, 427 U.S. 495, 505-506, 49 L.Ed.2d 651, S.Ct. 2755 (1976); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175, 31 L.Ed.2d 768, 92 S.Ct. 1400, (1972); and Gomez v. Perez, 409 U.S. 535, 538, 35 L.Ed.2d 56, 93 S.Ct. 872 (1973).

This Court has not hesitated to strike down legislative classifications involving the status of illegitimate versus legitimate children under intermediate scrutiny analysis when the classification does not serve an important governmental interest. Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175, 31 L.Ed.2d 768, 92 S.Ct. 1400 (1972); Clark v. Jeter, 486 U.S. 456, 100 L.Ed.2d 465, 108 S.Ct. 1910 (1988).

This court has only sustained such classifications when the necessary relationship to an important governmental interest is demonstrated as in Mathews v. Lucas. While the instant case involves

the same statutory scheme as Mathews v. Lucas and the governmental interest in avoiding spurious claims for Child Survivors benefits through an administratively convenient mechanism remains valid, Megan Orsini's claims are not even arguably "spurious". In her case there are none of the aforementioned "lurking problems of proof" justifying a denial of benefits to an applicant who fails to meet the dependency or support criteria. Because there was no problem of proof in the case before the court, the only difference between Megan and a child whose parents were married is Megan's illegitimacy. Accordingly, the decision to deny survivor's benefits based upon her father's work and payments to the system deprives her of an important benefit enjoyed by legitimate children merely because of her parents marital status. Such a distinction cannot stand the

heightened scrutiny required when illegitimacy is the basis for the distinction.

This court has long demonstrated a special concern for illegitimate children, particularly when the legislative or regulatory classification or its application yields an illogical, unjust or invidious result. Trimble v. Gordon, 430 U.S. 762, 52 L.Ed.2d 31, 97 S.Ct. 1459 (1977); Gomez v. Perez, 409 U.S. 535, 35 L.Ed.2d 56, 93 S.Ct. 872 (1973); and Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 31 L.Ed.2d 768, 92 S.Ct. 1400 (1972).

This court has also recognized the enormous significance of the HLA test by elevating entitlement to that test, in the context of paternity and support actions brought by the government, to a constitutional right, protected by the Due Process Clause. Little v. Streater, 452 U.S. 1, 68 L.Ed.2d 627, 101 S.Ct. 2202,

(1981).

It follows naturally from Little v. Streater (and was reemphasized in this Court's unanimous opinion in Clark v. Jeter) that the HLA test has assumed the pivotal role in any paternity action today. No longer need we rely upon vague, circumstantial or anecdotal evidence when an HLA result is available to attempt to resolve the historically difficult proof problems in such cases. The Eleventh Circuit apparently recognized this by stating in their decision to affirm the denial of benefits to Megan Orsini,

> "The result in this case is one which this court finds it hard to believe Congress desires." Orsini, supra, 902 F.2d at p. 1397

If the Eleventh Circuit decision were to remain undisturbed by this Court, one can envision significant numbers of children who are established by HLA testing to be the children of deceased wage earners but who face absolute

barriers to receipt of benefits due to the circumstances and timing of their father's deaths.

One can also only assume, regrettably, that the incidence of illegitimacy will remain substantially high in our society and that the use of the HLA test will only increase as society attempts to fix responsibility for those children. Children such as Megan in the particularly difficult circumstance of having a father who never had an opportunity to demonstrate his love and concern may not be great in number. The fact is that they do exist as do many others whose deceased fathers may have been HLA determined but did not otherwise take the steps necessary to cause their children to be eligible for these benefits. Again, in such cases the children are punished because the parents failed to marry. If Weber's teachings

mean anything, this punitive application cannot stand. As stated in Weber:

> "The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover imposing diabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual-as well as an unjust-way of deterring the parent. Courts are powerless to prevent social opprobrium suffered by these hapless children, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth whereas in this case the classification is justified by no legitimate state interest, compelling or otherwise."
> Weber, Supra, 406 U.S. at p. 175.

There is yet another "right" involved in this case that has not been mentioned but is extremely important in this Court's consideration of the issue presented herein; Michael Orsini's right to have his payroll taxes, upon his death, go to benefit his orphaned child. For if the Social Security Act is, as it has often been described, a contract between generations, an important aspect of that contract is a worker's entitlement to assume that his children will receive this paid for and owed benefit. That Michael Orsini did not know he was going to be Megan's father in no sense lessens this obligation on the part of the United States Government.

If the public, whose willing acceptance of the heavy burden of FICA taxation is critical to the ongoing viability of the system, becomes persuaded that the government will employ hidden irrational

criteria to evade its obligations to their children, then that consent may be undermined. As with all contracts, obligations flow in both directions. Michael Orsini and others in similar circumstances have met their part of the contract. It is now up to this Court to require the government to fulfill its obligations to those wage earners and their children.

2. THE UNITED STATES COURT OF APPEALS HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH PRINCIPLES ENUNCIATED IN RECENT DECISIONS OF THIS COURT.

The court, in the Clark v. Jeter case and Pickett v. Brown, 462 U.S. 1, 76 L.Ed.2d 372, 103 S.Ct. 2199 (1983), set aside barriers to paternity actions which were determined to be impenetrable. The decisive factor in the Court's decisions in those cases (striking down statutes of limitations on paternity actions) is the Court's enthusiastic endorsement of the

HLA test as an extremely reliable (effectively infallible when properly conducted) method of determining paternity. In Little v. Streater this Court, from the point of view of the alleged father, emphasized the exceptional validity of the test in requiring its provision to an indigent putative father under the Due Process Clause.

The Pickett v. Brown, and Clark v. Jeter cases reflect this Court's willingness to strike down barriers to illegitimate children seeking support largely because of the reliability of the HLA test and the overwhelming legal effect to be given to it. Rather than recognizing this dispositive evidence the Eleventh Circuit gave the evidence no weight, thus approving the statute's effect as an impenetrable barrier to Megan's receipt to benefits.

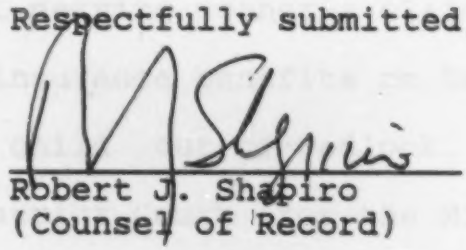
The Eleventh Circuit Court of

Appeals' opinion is in conflict with the principles articulated by this Court in the aforementioned cases.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that a Writ of Certiorari should issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,



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DATED: September 19, 1990

APPENDIX A

Alice ORSINI, on Behalf of Megan R. ORSINI, Plaintiff-Appellant,

v.

Louis W. SULLIVAN, Secretary of Health and Human Services, Defendant-Appellee.

No. 89-3223.

United States Court of Appeals, Eleventh Circuit

June 22, 1990.

Mother sought judicial review of decision of Appeals Council denying mother's claim for child's survivor insurance benefits on behalf of her posthumous child out-of-wedlock. The United States District Court for the Middle District of Florida, No. 86-1431-Civ-T-13B, George C. Carr, J., affirmed, and appeal was taken. The Court of Appeals, Frank A. Kaufman, Senior District Judge, sitting by designation, held that: (1)posthumous child out-of-wedlock, who was a one-week-old fetus

t time of father's death and who did not eet the statutory presumption of dependency nder the Social Security Act, had to show hat she was actually dependent on father to e entitled to survivor benefits, and (2) resumption of dependency provision did not iolate child's equal protection rights.

Affirmed.

1. **Social Security and Public Welfare**

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Posthumous child out-of-wedlock, who was a ne-week-old fetus at time of father's death nd who did not meet the statutory resumption of dependency under the Social ecurity Act, had to show that she was ctually dependent on father to be entitled o child's survivor insurance benefits; mere xpectation of support was not enough, otwithstanding that child would have had rouble proving dependency on father who was ot even aware of her existence. Social

Security Act, Section 216(h), as amended, 42 U.S.C.A. Section 416(h).

2. **Constitutional Law 242.3(2)**

Social Security and Public Welfare 122

Provision of Social Security Act, pursuant to which legitimate children are presumed dependent for purpose of their entitlement to social security child's survivor insurance benefits, did not violate equal protection rights of posthumous child out-of-wedlock. U.S.C.A. Const. Amends. 5, 14; Social Security Act, Section 216(h), as amended, 42 U.S.C.A. Section 416(h).

James Elliott, Bay Area Legal Services, Inc., Dade City, Fla. for plaintiff-appellant.

Carl Douglas Thoresen, Ralph J. Lee, Asst. U.S. Attys. Tampa, Fla., for defendant-appellee.

Appeal from the united States District Court for the Middle District of Florida.

Before FAY and KRAVITCH, Circuit Judges, and KAUFMAN*, Senior District Judge.

FRANK A. KAUFMAN, Senior District Judge:

Appellant, Alice Orsini,[1] gave birth to Megan Orsini on September 24, 1984. Megan's father, Michael T. Orsini, died fully insured under the Social Security Act, 42 U.S.C. Section 301, et seq. on January 2, 1984. In July, 1985, Alice Orsini initiated, at the Johns Hopkins University School of Medicine, a paternity test which established was 99.8% certainty that Michael T. Orsini was Megan's biological father. Alice Orsini never married or lived with Michael Orsini. They maintained separate apartments and were each employed and self-supporting. Alice Orsini's insurance company paid for the childbirth expenses.

*Honorable Frank A. Kaufman, Senior U.S. District Judge for the District of Maryland, sitting by designation.

1. Appellant changed her name from Garland to Orsini in a proceeding on August 21, 1984.

In October, 1984, appellant filed for Child's Survivor Insurance benefits under 42 U.S.C. Section 402(d)(1) on behalf of her daughter, alleging that the insured wage earner, Michael T. Orsini, was the child's biological father. The application was denied because the child claimant did not meet the relationship and dependency requirements of section 416(h) of the Act. The administrative law judge concluded that Megan Orsini was the insured's biological daughter, but denied benefits because the child did not meet the statutory requirements. 42 U.S.C. Section 416(h)(3)(C)(ii). After the Appeals Council refused to grant any relief to appellant, the decision of the administrative law judge became the final decision of the Secretary. Appellant then filed a complaint in the United States District Court for the Middle District of Florida, seeking to reverse the Secretary's denial of benefits. A magistrate

of that court recommended that the Secretary's decision be affirmed. That recommendation was accepted by the district judge, who, accordingly, entered judgment affirming the Secretary's decision, and appellant noted this appeal raising two issues:

1. In order to establish entitlement to Social Security Survivor benefits, must a posthumous child who does not satisfy the dependency presumptions of section 416(h) of the Act satisfy the dependency requirement of that section?
2. Does the statutory classification of section 416(h) of the Act requiring certain illegitimate children affirmatively to establish dependency, while affording

other illegitimate and legitimate children a presumption of dependency, violate the equal protection component of the Fifth Amendment due process clause?

For the reasons set forth in this opinion, we conclude that the answer to the first question is "yes", and the answer to the second question is "no".

I.

[1] The child of an insured deceased wage earner is entitled to survivor benefits if the child was dependent upon the insured at the time of death. 42 U.S.C. Section 402(d)(1)(C)(ii). The Social Security Act creates a series of presumptions of dependency. Legitimate children, including adopted children, are presumed dependent. 42 U.S.C. Section 416(e). Illegitimate children are presumed dependent if they satisfy any one of the following requirements:

entitlement to inherit personal property pursuant to the law of the state where the insured was domiciled at the time of death; participation in a marriage ceremony by the insured and the child's living parent which would have resulted in a valid marriage but for a legal impediment; written acknowledgement by the insured of paternity or maternity; judicial order requiring the insured to support the child; or judicial order entered prior to death decreeing the insured to be the child's parent. Section 416(h)(2),(3). If none of the above requirements is met, then the child is only entitled to benefits under section 416(h)(3)(C)(ii)[2] if the child can prove that

2. That statutory provision reads as follows:

> (3) An applicant who is the son or daughter of a fully or currently insured individual, but who is not (and is not deemed to be) the child of such insured individual under paragraph (2) of this subsection, shall nevertheless be deemed to be the child of such insured individual if:
> ....

the insured was the child's biological parent and was either living with or contributing to the support of the child at the time of the death of the insured.

The record demonstrates that Megan Orsini cannot meet any of the dependency requirements. Her parents never participated in a marriage ceremony or cohabited. There is no evidence that the insured acknowledged paternity in writing; in fact, the evidence suggests that he was unaware of appellant's pregnancy at the time of his death which took place about eight months before the child was born. No court ever ordered Orsini to support the child, and appellant does not assert that Megan Orsini is entitled to inherit her father's estate under applicable state law.

Section 416(h)(3)(C)(ii) has been interpreted to permit a posthumous child to receive survivor benefits upon a showing of a dependency. See, e.g., Adams v. Weinberger,

521 F.2d 656, 658 (2d Cir. 1975). Entitlement can be established by proving that the unborn child was dependent upon the wage earner at the time of death, and that the deceased had provided sufficient tangible support to the fetus, typically through support to the mother. Doran v. Schweiker, 681 F.2d 605, 609 (9th Cir. 1982).

Appellant argues that, because her child had only been conceived one week prior to Michael orsini's death, the child is entitled to benefits solely by virtue of the facts that the insured was her father since the child needed no support during that week. Appellant bases that argument upon the doctrine established in Adams, seemingly the leading case with regard to section 416(h)(3)(C)(ii) eligibility for posthumous

> (C) in the case of a deceased invidivual-
> ...
> (ii) such insured individual is shown by evidence satisfactory to the Secretary to have been the mother or father of the applicant, and such insured individual was living with or contributing to the support of the applicant at the time such insured individual died.

children. In Adams, Judge Meskill held that a posthumous illegitimate child was entitled to survivor's benefits because the father, inter alia, had, prior to his death, paid the mother's apartment rent and hospital registration fee. In so concluding, Judge Meskill wrote that the test for "support", under section 416(h) in the case of a posthumous child was whether the support given was "commensurate with the needs of the unborn child at the time of the father's death." Id. at 660. That standard has been applied in other circuits. See, e.g., Rubinski v. Bowen, 808 F.2d 611, 613 (7th Cir. 1986); Doran v. Schweiker, 681 F.2d at 608-09. Appellant reasons from Adams that, because Michael orsini died when the child was a week-old-fetus and had no need for support prior to Michael Orsini's death and because Michael was not even aware of Alice Orsini's pregnancy, there was no reason for Michael to provide tangible support to the

unborn child, and the fact that he did not do so does not defeat the within claim for benefits.

It is true that, in Adams and the cases adopting its approach, the standard of "support commensurate with the needs of the child" has been construed liberally in favor of posthumous child claimants. Yet, such claimants have not been successful when the insured had only contributed occasional gifts to the mother which were in the nature of "courtship" rather than support. Dubinski, 808 F.2d at 613. Also, "mere expectation of support" from the wage earner is not sufficient. Schaefer v. Heckler, 792 F.2d 83, 86 (7th Cir. 1986). The same is true with regard to a "lost prospect of support." Dubinski, 808 F.2d at 613.

Courts applying the approach of Adams have dealt with the problem identified by appellant herein, i.e., discerning "contribution of support" to a fetus who as

yet has no apparent need of support, by transferring support conferred upon the mother to the claimant child.

> [S]ome adjustment to the manner of proving support should be made when the applicant is an illegitimate child born after the alleged father ... dies. In such a case, the attention and support conferred upon the mother inures to the benefit of the fetus, and the Secretary should consider whether the alleged aid is commensurate with the needs of the unborn child at the time of the father's demise.

Imani v. Heckler, 797 F.2d 508, 513 (7th Cir.), cert. denied, 479 U.S. 988, 107 S.Ct. 580, 93 L.Ed.2d 583(1986).

At least one court has seemingly repudiated appellant's argument that no showing of dependency should be required when a posthumous child applies for benefits. In Clay v. Heckler, 583 F.Supp. 499, 502 (N.D.

Cir.1984), the court stated:

> Granting benefits to illegitimate children who are born after their fathers' death and whose mothers received no financial support from the fathers in preparation for their birth would be contrary to this Congressional intent [to require dependency] because any indicia of dependency on the insured wage-earners would be lacking.

In Gay, the court characterized a grant of benefits under such circumstances the creation of "an extra-statutory presumption."Id.

In Fleming v. Califano, 594 F.2d 1081 (5th Cir.), cert. denied, 444 U.S. 918, 100 S.Ct. 234, 62 L.Ed.2d 173 (1979), the Fifth Circuit upheld the denial of benefits to an illegitimate child whose mother showed that the deceased was the father, but who could not prove that the deceased lived with her or provided any support to the child. Although

the mother had instituted child support and paternity suits and a proposed settlement was pending at the time of the insured's death, the Fifth Circuit, in a per curiam opinion, wrote: "Applicants who are not actually dependent, but who have an expectation of, and a need for, support are simply (and unfortunately) excluded from receiving benefits unless they meet one of the presumptions of dependency." Id. at 1083, relying upon Mathews v. Lucas, 427 U.S. 495, 96 S.Ct. 2755, 49 L.Ed.2d 651 (1975).[3]

There are, however, certain dissimilarities between the facts in Fleming and in this case. In Fleming, the child was born before the father's death, and the father had ample opportunity before his death to offer support to the mother, but affirmatively

3 Fleming, as a holding of the Fifth Circuit prior to the split of that Circuit into the present Fifth and this (the Eleventh) Circuits, is binging upon this Court. Bonner v. Prichard, 661 F.2d 1206, 1209 (11 Cir. 1981) (en banc).

chose not so to do. In contrast, Michael Orsini was apparently unaware of Alice Orsini's pregnancy when he died. While there is no evidence that if he had lived he would have provided support for the child, there is also no evidence that he would not have done so.

In that light, appellant's argument that the humanitarian and remedial goals of the Social Security Act mitigate in favor of an award to Megan Orsini is not without appeal- more appeal than existed in Fleming. Appellant urges that, despite the express dependency provisions of the statute, any reading of its terms requiring proof of dependency in the narrow circumstances of this case works a result inconsistent with the broad legislative purpose of the Social Security Act of providing support to genuine dependents. Appellant further argues that a dependency requirement in this case operates as an "exaltation of form over substance"

because appellant cannot possibly prove dependency on the part of a one week old fetus.

But that argument may not prevail. First, in addition to achieving humanitarian and remedial objectives, Congress also intended that the statutory scheme of the Social Security Act weed out "spurious claims." Claims may be spurious by virtue of "fabricated" evidence of either parentage or support. Jimenez v. Weinberger, 417 U.S. 628, 636, 94 S.Ct. 2496, 2501, 41 L. Ed.2d 363 (1974). Indeed, Congress seemingly deliberately crafted the presumptions and dependency requirements so as to prevent payments to ineligible persons and to enable determinations with regard thereto to be administratively made in an efficient manner. Mathews vs. Lucas, 427 U.S. at 509, 96 S.Ct. at 2764. Thus, the provisions of section 416(h) cannot be deemed inconsistent with the broad goals of the Act. Under the

circumstances, appellant cannot prevail upon the first issue, i.e., the statutory construction question, presented by her.

II.

[2] Appellant, in addition to urging her entitlement as a matter of statutory construction-a contention this Court rejects for the reasons stated supra-also contends that the support and cohabitation requirements of section 416(h)(3)(C)(ii) violate the equal protection component of the due process clause of the Fifth Amendment, citing Weber vs. Aetna Casualty and Surety Co., 406 U.S. 164, 92 S.Ct. 1400, 31 L.Ed.2d 768 (1972). In Weber, the Supreme Court held that provisions of the Louisiana Worker's Compensation Act, by affording to the claims of legitimate and acknowledged illegitimate children higher priority than those of unacknowledged illegitimate children, violated equal protection principles. Appellant asserts that the statutory scheme

f section 416(h), pursuant to which certain illegitimate children must establish dependency while legitimate children and other illegitimate children may invoke various presumptions of dependency, is inconsistent with the teachings of Weber. Unfortunately for appellant, that contention has already been directly considered and rejected by the Supreme Court in Mathews v. Lucas, 427 U.S. at 509, 96 S.Ct. at 2764. In Lucas, Justice Blackmun, over the dissent of Justice Stevens who was joined by Justices Brennan and Marshall, held for the Court's majority that the statutory presumptions are reasonably related to the likelihood of dependency at the time of the death of the insured, and, as such, are justified by administrative convenience and do not impermissibly discriminate against children required to prove dependency. Relying upon Lucas, the Fifth Circuit in Fleming, 594 F.2d at 1083, and the Seventh Circuit in Imani,

797 F.2d at 513, have rejected equal protection challenges similar to the challenge of appellant herein. For the same reasons, we must reject appellant's equal protection challenge.

III.

The result in this case is one which this court finds it hard to believe Congress desires. However, as the district court noted in Gay v. Heckler, 583 F.Supp. at 502, "[t]here may be cases where proof of dependency by a showing of financial support is utterly impractical and impossible. Such cases must be commended to the attention of Congress." In that context, this Court does direct the Secretary to bring this case to the attention of the Congress and to ask the Congress to consider whether or not an appropriate statutory amendment should be enacted in order to prevent the type of result presently compelled in this case and presumably in similar cases.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ALICE ORSINI, o/b/o :
MEGAN R. ORSINI, :

Plaintiff, :

v. : Case No. 86-1431-CIV-T-13(B)

OTIS R. BOWEN, :
Secretary of Health :
and Human Services, :

Defendant. :

:

O R D E R

THIS CAUSE came on for consideration upon the filing of a petition for review of the decision of the Secretary of Health and Human Services.

This matter was considered by the United States Magistrate, pursuant to the general order of assignment, who has filed his report recommending that the decision of the Secretary be affirmed.

Upon consideration of the report and recommendation of the Magistrate and upon this Court's independent examination of the file, the Magistrate's report and recommendation is adopted and confirmed and made a part hereof, and it is

ORDERED:

1. That the decision of the Secretary is hereby AFFIRMED.

2. Each party shall bear its own costs.

DONE AND ORDERED in Chambers in Tampa, Florida this 20th day of January, 1989.

George Carr
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ALICE ORSINI, o/b/o :
MEGAN R. ORSINI, :

Plaintiff, :

v. :CASE No.86-CIV-T-13(B)

OTIS R. BOWEN, :
Secretary of Health :
and Human Services, :

Defendant. :

_____:

REPORT AND RECOMMENDATION

The plaintiff in this action seeks review of the denial of her claim on behalf of her minor child for Social Security survivor's benefits.[1] Specifically, she challenges the construction and application by the

[1]This matter comes before the undersigned pursuant to the Standing Order of this court dated August 28, 1987. See also Local Rule 6.01(c)(21).

Secretary of Health and Human Services of the pertinent statutory provision. Because I think the Secretary's construction is correct, I recommend that the decision of the Secretary be affirmed.

I.

On October 29, 1984, the plaintiff applied for surviving child's insurance benefits on behalf of her daughter, Megan Orsini, on the record of wage earner Michael T. Orsini, alleging that Michael was Megan's natural father.[2] The claim was denied initially and on reconsideration.

The plaintiff, at her request, then received a de novo hearing before an administrative law judge. The law judge, noting that the essential facts of the case

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[2]The child was born out of wedlock. Although the plaintiff and Michael Orsini were never married, she had her legal surname changed to Orsini by court order on August 21, 1984. The child's birth certificate was then issued bearing the surname Orsini (Tr 29, 90).

were not in dispute, found that the child was not entitled to benefits under any of the criteria established by the Social Security Act concerning surviving illegitimate children of a deceased, insured wage earner. First, Megan Orsini could not show that she was entitled to inherit property passing intestate from Michael Orsini under the law of his domicile, Virginia. Second, she could not show that her mother and the wage earner had participated in a ceremonial marriage. Furthermore, the wage earner was never decreed by a court to be the child's father, was never ordered to pay support for her, and never acknowledged her in writing to be his child. Finally, the law judge found that, although the evidence established Megan Orsini to be the biological child of the wage earner, he was not living with or contributing to the support of her mother at the time of his death, which was approximately one week after the child's

conception. (Tr. 18-19).

The plaintiff sought review from the Appeals Council of the denial of benefits to the child. The Appeals Council let the decision of the law judge stand as the final decision of the Secretary.

II.

The Social Security Act provides survivor's benefits for unmarried minor or disabled "children"[3] of deceased wage earners who were dependent on the wage earner at the time of his or her death. 42 USC 402(d)(1). Legitimate children of the wage earner,

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[3]The term "child of the insured" as defined by the Social Security Act can include legitimate children, adopted children, stepchildren, grandchildren and step grandchildren. The term is not limited to those biological offspring of the insured, but includes within the definition those dependent upon the insured for support. Thus, persons not biological offspring of the insured can nevertheless fall within the definition of "child" and therefore be entitled to benefits, and persons who are biological offspring but not dependent upon the wage earner may be excluded from the definition of "child".

including those adopted by him, are deemed by the Act to be dependent upon him. 42 USC 402(d)(3); 42 USC 416(e).

Illegitimate children can show that they are entitled to benefits by meeting one of the presumptions of dependency set out in 42 USC 416(h). First, if the child would be entitled under the law of the state in which the insured person was domiciled when he died to inherit the deceased's personal property as his child if he died intestate, then the child would be entitled to benefits under the Social Security Act. 42 USC 416(h)(2)(A).

Second, the illegitimate child would be entitled to benefits if the insured and the child's mother participated in a marriage ceremony which would have resulted in a valid marriage but for some legal impediment. 42 USC 416(h)(2)(B).

If the child can satisfy neither of the above criteria, he may still establish entitlement to benefits as a surviving

dependent child of the deceased by showing one of the following: that the deceased had acknowledged in writing that the child is his; or that the deceased had been ordered by a court to contribute to the child's support; or that the deceased before his death was declared the child's father by court order. 42 USC 416)h)(3)(C)(i).

If the child can produce no evidence of any one of these events, the child can only obtain benefits where evidence "satisfactory to the Secretary" shows the deceased to have been the biological father of the child and the deceased was living with or contributing to the support of the child at the time he died. 42 USC 416(h)(3))C)(ii). Where the child is unborn but rather still in utero at the time of the wage earner's death, contributions to the support of the mother constitute contributions to the support of the unborn child. See Adams v. Weinberger, 681 F.2d 605 (9th Cir. 1982); Social Security

III.

The administrative law judge considered the question of Megan Orsini's entitlement in accordance with the foregoing principles of law. In doing so, he found that the child was not entitled to survivor's benefits on the record of Michael Orsini even though the plaintiff had established that the wage earner was Megan Orsini's biological father (Tr. 18).

The record shows that Megan Orsini was born out of wedlock. Furthermore, Alice Orsini and Michael Orsini never participated in any marriage ceremony. There is no evidence that Michael Orsini acknowledged paternity in writing, in court, or otherwise. Indeed, the evidence shows that he was unaware of the plaintiff's pregnancy at the

time of his death (TR. 31).[4] No court ever ordered Orsini to support the child. Furthermore, the plaintiff and Michael Orsini never cohabited (Tr. 34). Therefore, the plaintiff clearly could not establish her child's entitlement to survivor's benefits pursuant to any of the sections which would provide the child with a presumption of dependency. Thus, the parties have concentrated their arguments on whether the Plaintiff has established entitlement pursuant to 42 USC 416(h)(3)(C)(ii).

The plaintiff argues that, because her evidence establishes that Megan was fathered by the wage earner, and the child was not in need of any support from him at the time of

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[4] Mr. Orsini died on January 2, 1985, of acute alcohol intoxication (TR. 81-82). The plaintiff did not obtain a positive pregnancy test until January 24, 1984 (Tr. 31). The child was born on September 24, 1984 (Tr. 87). As the law judge pointed out, the time between the death of Mr. Orsini and the birth of the child indicates that the child was conceived approximately a week before his death.

his death, the child is entitled to benefits under Section 416(h)(3)(C)(ii). The plaintiff bases her argument on the court's holding in Adams v. Weinberger, 521 F.2d 656 (2d Cir. 1975) (illegitimate child entitled to survivor's benefits where father who died before child's birth paid mother's apartment rent and hospital registration fee). The court in Adams held that the test of "support" in determining whether an illegitimate posthumous child was entitled to benefits was not whether support was "substantial" but whether it was commensurate with the needs of the child at the time of the father's death. The plaintiff reasons that, because Megan Orsini was not in need of any "support", the deceased's failure to provide support for either the mother or the fetus is not fatal to the child's claim for benefits.

However, the plaintiff's argument ignores the clear terms of Section 416(h)(3)(C)(ii).

The statute provides that the Social Security claimant must show both paternity and that the father was living with or contributing to the support of the claimant at the time of his death. It is true that "support commensurate with the needs of the child" has been construed liberally. See, e.g., Adams v. Weingerger, supra; Doran v. Schweiker, 681 F.2d 605 (9th Cir. 1982). However, it is clear that the claimant must show that some tangible support was given. See Cox v. Schweiker, 684 F.2d 310 (5th Cir. 1982) (father's contribution of $400 and some clothing to illegitimate child is not support making child dependent on father for purposes of entitlement to survivor's benefits); Schaeffer on behalf of Schaeffer v. Heckler, 792 F.2d 81 (7th Cir. 1986) (illegitimate child not entitled to survivor's benefits where deceased father never lived with nor provided support for fiance'/mother although he had proposed marriage and promised to pay

hospital bills).

Moreover, a mere expectation of support from the wage earner is not sufficient to justify an award of benefits under Section 416(h)(3)(C)(ii). Doran, 681 F.2d at 609-10. Therefore, the evidence offered by the plaintiff showing that the decedent's family accepts the child as his, and that the decedent would have loved and supported the child, possibly intending to marry the plaintiff, does not authorize an award of benefits in this case.

The plaintiff's argument seeks to allow an illegitimate child to obtain survivor's benefits solely by proving that the deceased insured is the child's father. This is contrary to the terms of the statute. The court in Flemin v. Califano, 594 F.2d 1081 (5th Cir. 1979), cert. denied, 444 U.S. 918, [5]

[5] In Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981)(en banc), the Eleventh Circuit Court adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

recognized the fallacy in the same argument the plaintiff advances in this cause. There, an illegitimate child whose mother showed that the insured deceased was the father was denied benefits because the mother could not show that the deceased lived with her or provided any contributions toward the child's support. The mother had instituted child support and paternity suits, but a proposed settlement of those cases was never consummated. The court stated, "[a]pplicants who are not actually dependent, but who have an expectation of and a need for, support are simply (and unfortunately) excluded from receiving benefits unless they meet one of the presumptions of dependency." 594 F.2d at 1083, citing Matthews v. Lucas, 427 U.S. 495 (1975). Therefore, in order to obtain benefits, assuming arguendo that paternity is conclusively established, the plaintiff must have shown that Michael Orsini lived with her or contributed toward her support prior to

his death. It is undisputed, however, that he did not.

The plaintiff further urges that the humanitarian and remedial goals of the Social Security Act mitigate in favor of an award of benefits to Megan Orsini. However, the Secretary's and this court's ability to construe the Social Security Act broadly is limited by its language, which clearly requires the plaintiff to show dependency on the part of her child. As the court noted in Gay on behalf of McBride v. Heckler, 583 F.Supp 499, 502 (D. Ga. 1984), "[t]here may be cases where proof of dependency by a showing of financial support is utterly impractical and impossible. Such cases must be commended to the attention of Congress."

IV.

For the forgoing reasons, the plaintiff's legal argument in favor of an award of benefits to her daughter is without merit. I, therefore, recommend that the Secretary's

decision be affirmed.

Respectfully submitted,

Thomas G. Wilson
THOMAS G. WILSON
UNITED STATES
MAGISTRATE

DATED: DECEMBER 14, 1988

NOTICE TO PARTIES

Failure to file written objections to the proposed findings and recommendations contained in this report within ten days from the date of its service shall bar an aggrieved party from attacking the factual findings on appeal. 28 USC 636(b)(1).

APPENDIX D

DEPARTMENT OF HEALTH & HUMAN SERVICES

Social Security Administration
Office of Hearings and Appeals
P. O. Box 3200
Arlington, VA 2203

Refer to:
SGLD1 July 18, 1986
225-88-8097

ACTION OF APPEALS COUNCIL ON REQUEST FOR REVIEW

Ms. Alice Orsini O/B/O
Megan R. Orsini
22 Lawrence Road
Dade City, FL 33525

Dear Ms. Orsini:

The request for review of the Administrative Law Judge's decision in your case has been considered.

Social Security Administration regulations provide that the Appeals Council will grant a request for review where (1) there appears to be an abuse of discretion by the Administrative Law Judge; (2) there is an error of law; (3) the Administrative

Law Judge's action, findings, or conclusions are not supported by substantial evidence; or (4) there is a broad policy or procedural issue which may affect the general public interest. (These provisions are contained in 20 CFR 404.970 for Social Security claims under Title II of the Social Security Act and in 20 CFR 416.1470 for supplemental security income claims under Title XVI of the Act.)

The Appeals Council has concluded that there is no basis under the above regulations for granting your request for review. Accordingly, your request is denied and the Administrative Law Judge's decision stands as the final decision of the Secretary in your case.

If you desire a court review of the Administrative Law Judge's decision, you may commence a civil action by filing a

complaint in the United States District Court for the judicial district in which you reside within sixty (60) days from the date of receipt of this letter. It will be presumed that this letter is received within five (5) days after the date shown above unless a reasonable showing to the contrary is made. The complaint should name the Secretary of Health and Human Services as the defendant and should include the Social Security number(s) shown at the top of this notice. The right to court review is provided for in section 205(g) of the Social Security Act, as amended (42 U.S.C. 405(g)) for claims under Title II and in section 1631(c)(3) of the Act (42 U.S.C. 1383(c)(3) for claims under Title XVI.

If a civil action is commenced, the Secretary must be served by sending a copy of the summons and complaint by registered

or certified mail to the General Counsel of the Department of Health and Human Services at 200 Independence Avenue, SW, Washington, DC 20201. (See Rules 4(c)(2) and (d)(4) and (5) of the Federal Rules of Civil Procedure and Part 45, Section 4.1 of the Code of Federal Regulations.) In addition, you must serve the United States Attorney for the district in which you file your complaint and the Attorney General of the United States, as provided in the Federal Rules of Civil Procedure.

Sincerely yours,

Marilyn W. Carney
Member, Appeals Council

cc:
James Elliott, Esq.
SSO, Dade City, FL
HO, Tampa, FL (ALJ Crumbley)

APPENDIX E

DEPARTMENT OF HEALTH & HUMAN SERVICES

Social Security Administration
Office of Hearings and Appeals
P. O. Box 3200
Arlington, VA 2203

Refer to:
SGLD1 August 07, 1986
225-88-8097

Ms. Alice Orsini O/B/O
Megan R. Orsini
22 Lawrence Road
Dade City, FL 33525

Dear Ms. Orsini:

Subsequent to its notice of July 18, 1986 to you, the Appeals Council received additional arguments from your representative. He essentially repeated his previous arguments that as Megan R. Orsini was only a one week old fetus at the time of Michael Orsini's death, she did not "need" any support from her father, the wage earner, and that she had reason to expect that he would have supported her, had he known of Megan's

existence and had lived.

Section 216(h)(3)(A)(B)(C)(ii) of the Social Security Act requires both biological paternity and either living with or support from the father. Inasmuch as Megan (nor Megan's mother, Alice Orsini) did not receive any support contributions from Michael Orsini, she is not entitled to child's insurance benefits on his Social Security record.

In view of the above, the Appeals Council has decided that there is no basis for vacating its previous action. Accordingly, the hearing decision dated April 21, 1986 stands as the final decision of the Secretary.

In the event that you wish to appeal your case further, the time within which to commence civil action is hereby extended to 60 days from the date of receipt of

this letter. The date of receipt shall be presumed to be 5 days after the date of this letter, unless there is a reasonable showing to the contrary.

Sincerely yours,

Marilyn W. Carney
Member, Appeals
Council

cc:
James Elliott, Esq.

APPENDIX F

DEPARTMENT OF
HEALTH AND HUMAN SERVICES
Social Security Administration
OFFICE OF HEARINGS AND APPEALS

DECISION

IN THE CASE OF:	**CLAIM FOR:**
Alice Orsini for Megan R. Orsini (Claimant)	Surviving Child's Insurance Benefits
Michael J. Orsini (Wage Earner)	225-88-8097 (Social Security No)

This case is before the Administrative Law Judge on a request for hearing. The Administrative Law Judge has carefully considered all the documents identified in the record as exhibits, the testimony at the hearing and arguments presented.

ISSUES

The issue before the Administrative Law Judge is whether Megan R. Orsini is entitled to child's insurance benefits on the record of the wage earner.

Specifically at issue is whether she is the "child" of the wage earner within the meaning of the Social Security Act.

APPLICABLE REGULATION AND EVALUATION OF THE EVIDENCE

Section 202(d)(1) of the Social Security Act provides, as pertinent here, for the payment of insurance benefits to a child (as defined in section 216(e) of the Act) of an individual who dies a fully or currently insured individual if the child has filed application for child's insurance benefits, is unmarried, and was dependent on such individual at the time of his death.

Section 216(e) of the Act provides, as pertinent here, that the term "child" means the child or legally adopted child of an individual.

Pursuant to section 216(h)(2)(A) of the Act, a finding as to whether an applicant is the child of an insured individual must be based on the law that, in determining inheritance rights to intestate personal property, would be applied by the courts of the State where the insured individual was domiciled at the time of his death.

Section 216(h)(2)(B) of the Act provides, as pertinent here, that if an applicant is not a child of the insured individual under subparagraph (A), such applicant shall nevertheless be deemed to be the child of such individual if the insured individual and the child's mother went through a marriage ceremony resulting in a purported marriage between them, but for a legal impediment, would have been a valid marriage.

Section 216(h)(3)(C) of the Act provides,

as pertinent here, that if an applicant who is the child of an insured individual but does not qualify as his child under either of the above provisions may still qualify if the individual had acknowledged in writing that the applicant is his child, had been ordered by a court to contribute to the applicant's support, had been decreed by a court to be the father of the child, or is shown by other satisfactory evidence to have been the father of the applicant and was either living with or contributing to the support of the applicant when he died.

Where the deceased insured worker, at the time of his death, was living with and contributing to the support of the mother of his unborn illegitimate child, the worker's contributions to the support of the child's mother and his living with the mother constitute contributions to the

support of, and living with, the unborn child within the meaning of section 216(h)(3)(C) of the Act, provided that the child was born alive. (Social Security Ruling 68-22, 1968 Cumulative Bulletin).

Virginia inheritance law, as applicable, provides that a child born out of wedlock acquires status of child if:

(1) parents intermarry and father recognizes child, or,

(2) the natural parents participated in a marriage ceremony before or after the child's birth, even if the marriage is void, or

(3) paternity is established by evidence showing any of the following:

(a) That the father cohabited openly with the mother during

all of the 10 months immediately prior to the time the child was born;

(b) That the father gave consent to a physician or other person, not including the mother, charged with the responsibility of securing information for the preparation of a birth record, that his name be used as the father of the child upon the birth records of the child;

(c) That the father allowed by a general course of conduct the common use of his surname by the child;

(d) That the father claimed the child as his child on any

statement, tax return or other document filed and signed by him with any local state or federal government or any agency thereof;

(e) That the father admitted before any court having jurisdiction to try and dispose of the same that he is the father of the child; or

(f) That the father voluntarily admitted paternity in writing, under oath.

On October 29, 1984, an application for surviving child's insurance benefits was filed on behalf of Megan R. Orsini, the claimant, on the record of the wage earner who died a fully insured individual on January 2, 1984. The application was

denied initially, and upon reconsideration based on the conclusion that the requisite relationship of "child" of the wage earner had not been established. The case is before the undersigned on a timely request for hearing.

The essential facts in this case are not in dispute. The wage earner died in the District of Columbia on January 2, 1984, and his residence was the State of Virginia. The claimant child was born on September 24, 1984, and is the biological offspring of the wage earner and Alice J. Orsini. The preponderance of the evidence establishes that the child was conceived approximately a week prior to the wage earner's death, and at that time he did not know he had fathered her. The child was born out of wedlock. Her parents had never been married to each other, nor to anyone else. The posthumous child would

not be recognized as the child of the wage earner for the purposes of intestate sucession of personal property under the law of the State of Virginia under any of the alternative provisions set forth above. Therefore, the requisite relationship of "child" cannot be established under either of the alternative provisions of section 216(h)(2) of the Social Security Act.

Obviously, based on the wage earner's lack of knowledge at the time of his death that he had fathered the claimant child, there is no possibility he could have acknowledged the child in writing or otherwise, and no court order or decree declaring him to be the father of the child or ordering him to contribute to her support. Therefore, the potential for entitlement by establishing the requisite relationship under section 216(h)(3) of

the Act is not possible, that is, with the exception of the last provision, wherein the relationship can be established by satisfactory evidence showing the wage earner was in fact the father of the claimant and he was living with or contributing to the support of the child at the time that he died. Establishment of the requisite relationship is asserted because the evidence does establish the biological relationship, and it is alleged there was more than a reasonable expectation that the child would have been supported by the wage earner had he lived. Therefore, it is asserted that the purpose of surviving child's insurance benefits, that is, providing for support of dependents, would be frustrated if the claimant is not found entitled to benefits. (Exhibit 20).

As set forth above, Social Security Ruling

68-22, 1968 Cummulative Bulletin, stands for the proposition that where a deceased wage earner, at the time of his death, was living with and contributing to the support of the mother of his unborn illegitimate child, his contributions to the support of the child's mother and his living with the mother constitute contributions to the support of, and living with, the unborn child within the meaning of the section 216(h)(3) of the Act.

The testimony and evidence in this case fails to demonstrate that the wage earner and the mother of the claimant were not living together at the time of his death nor was he contributing to her support at that time. Accordingly, applying the Social security Ruling, it cannot be found that the requisite relationship has been established, nor based on the above

conclusions concerning the other alternative provisions for establishing relationship of the child, can it be found that she is entitled to benefits. Accordingly, while there is little, if any, doubt that the wage earner was the biological father of the claimant child, entitlement to child's insurance benefits cannot be established.

The undersigned is fully cognizant of the legal precedents by way of court cases being urged for the establishment of entitlement. However, in this case as in all cases which come before the undersigned, the Social Security Act, implementing regulations, and rulings of the Secretary must be applied. Application of the appropriate ruling concerning posthumous illegitimate children makes establishment of the requisite relationship an impossibility.

Furthermore, the undersigned would note that the precedents set forward in furtherance of entitlement would have to be stretched considerably to accomplish that end. That is, what is effectively being urged is that there be no test with regard to contributions or living with where the existence of a recently conceived child is unknown to a wage earner at the time of his death. This cannot be accomplished applying the law by which the undersigned is bound. Accordingly, it must be found that the claimant child is not entitled to surviving child's insurance benefits on the record of the deceased wage earner.

FINDINGS

After careful consideration of the entire record, the administrative law judge makes the following findings:

1. Megan R. Orsini, the claimant, is not

the "child" of the wage earner under Virginia State law under section 216(h)(2)(A) of the Social Security Act.

2. The claimant is not the "child" of the wage earner pursuant to section 216(h)(2)(B) of the Social Security Act because her mother and the wage earner never went through a ceremonial marriage.

3. The claimant is not the child of the wage earner pursuant to section 216(h)(3)(C) of the Social Security Act as the evidence of record does not establish that the wage earner was ever decreed by court to be her father, was ever ordered by a court to

contribute to her support, or ever acknowledged by him in writing. Furthermore, although the evidence does establish that the wage earner was the biological father of the claimant, the wage earner was not either living with the claimant's mother or contributing to her support at the time of his death approximately one week after the child was conceived.

DECISION

It is the decision of the administrative law judge that Megan R. Orsini is not entitled to child's insurance benefits on the record of the wage earner for which application was filed on her behalf on October 29, 1984.

DECISION

It is the decision of the administrative law judge that Megan E. Crain is not entitled to child's insurance benefits on the record of the wage earner for which application was filed on her behalf on October 29, 1984.

Walter S. Crumbley
Administrative Law Judge

April 21, 1986
Date

APPENDIX G

FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX H

STATUTORY PROVISIONS INVOLVED

1. Section 202(d)(1) of the Act, as set forth in 42 U.S.C. Section 402(d)(1) [42 USCS Section 402(d)(1)], provides in pertinent part:

"Every child (as defined in section 416(e) of this title) . . . of an individual who dies a fully or currently insured individual, if such child-

"(A) has filed application for child's insurance benefits,

"(B) at the time such application was filed was unmarried and (i) either had not attained the age of 18 or was a full-time student and had not attained the age of 22 . . . and

"(C) was dependent upon such individual-

. . . . . .

"(ii) if such individual has died, at the time of such death, ...

APPENDIX B

STATUTORY PROVISIONS INVOLVED

1. Section 202(d)(1) of the Act, as set forth in 42 U.S.C. Section 402(d)(1) [42 USCS Section 402(d)(1)], provides in pertinent part:

"Every child (as defined in section 216(e) of this title) . . . of an individual who dies a fully or currently insured individual, if such child-

"(A) has filed application for child's insurance benefits,

"(B) at the time such application was filed was unmarried and (i) either had not attained the age of 18 or was a full-time student and had not attained the age of 22 . . . and

"(C) was dependent upon such individual-

. . . . . .

"(ii) if such individual has died, at the time of such death, ...

"shall be entitled to a child's insurance benefit for each month, beginning with the first month after August 1950 in which such child becomes so entitled to such insurance benefits . . . ."

Section 216(e), 42 U.S.C. Section 416(e) [42 USCS Section 416(e)], includes, under the definition of child, inter alia, "the child . . . of an individual," certain legally adopted children, certain stepchildren, and certain grandchildren and stepgrandchildren. Additionally, Section 216(h)(2)(A) of the Act, 42 U.S.C. Section 416(h)(2)(A) [42 USCS Section 416(h)(2)(A)], provides:

"In determining whether an applicant is the child . . . of a fully or currently insured individual for purposes of this subchapter, the Secretary shall apply such law as would be applied in determining the devolution of intestate personal property . . . by the courts of the State in which

[such insured individual] was domiciled at the time of his death . . . . Applicants who according to such law would have the same status relative to taking intestate personal property as a child . . . shall be deemed such."

2. Section 202(d)(3) of the Act, 42 U.S.C. Section 402(d)(3) [42 USCS Section 402(d)(3)], provides in pertinent part:

"A child shall be deemed dependent upon his father or adopting father or his mother or adopting mother at the time specified in paragraph (1)(C) of this subsection unless, at such time, such individual was not living with or contributing to the support of such child and-

"(A) such child is neither the legitimate nor adopted child of such individual, or

"(B) such child has been adopted by some other individual."

Additionally, any child who qualifies under Section 216(h)(2)(A), see n 1, supra, is considered legitimate for Section 202(d)(3) purposes, and this dependent.

3. Section 202(d)(3), as set forth in 42 U.S.C. Section 402(d)(3) [42 USCS Section 402(d)(3)] provides in pertinent part that "a child deemed to be a child of a fully or currently insured individual pursuant to section 216(h)(2)(B) or section 216(h)(3) . . . shall be deemed to be the legitimate child of such individual," and therefore presumptively dependent. Section 216(h)(2)(B), as set forth in 42 U.S.C. Section 416(h)(2)(B) [42 USCS Section 416(h)(2)(B)] provides:

"If an applicant is a son or daughter of a fully or currently insured individual but is not (and is not deemed to be) the child of such insured individual under subparagraph (A), such applicant shall

nevertheless be deemed to be the child of such insured individual if such insured individual and the mother or father, as the case may be, of such applicant went through a marriage ceremony resulting in a purported marriage between them which, but for a legal impediment described in the last sentence of paragraph (1)(B), would have been a valid marriage."

The specified last sentence of Section 216(h)(1)(B), 42 U.S.C. Section 416(h)(1)(B) [42 USCS Section 416(h)(1)(B)] in turn, refers only to "an impediment (i) resulting from the lack of dissolution of a previous marriage or otherwise arising out of such previous marriage or its dissolution, or (ii) resulting from a defect in the procedure followed in connection with such purported marriage."

Section 216(h)(3), as set forth in 42 U.S.C. Section 416(h)(3), provides:

"An applicant who is the son or daughter of a fully or currently insured individual, but who is not (and is not deemed to be) the child of such insured individual under paragraph (2) of this subsection shall nevertheless be deemed to be the child of such insured individual if:

. . . . . .

"(C) In the case of a deceased individual-

"(i) such insured individual-

"(I) had acknowledged in writing that the applicant is his son or daughter.

"(II) had been decreed by a court to be the father of the applicant, or

"(III) had been ordered by a court to contribute to the support of the applicant because the applicant was his son or daughter.

"and such acknowledgment, court decree, or court order was made before the death

of such individual, or

"(ii) such insured individual is shown by evidence satisfactory to the Secretary to have been the father of the applicant, and such insured individual was living with or contributing to the support of the applicant at the time such insured individual died."

(2)

No. 90-506

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

ALICE ORSINI, o/b/o MEGAN R. ORSINI, PETITIONER

v.

LOUIS W. SULLIVAN,
SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held, based upon *Mathews* v. *Lucas*, 427 U.S. 495 (1976), that provisions in the Social Security Act determining eligibility for child's insurance benefits do not unconstitutionally discriminate against illegitimate children.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A20) is reported at 903 F.2d 1393. The opinion of the district court (Pet. App. B1-B2) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 1990. The petition for a writ of certiorari was filed on September 19, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 202(d) of the Social Security Act, 42 U.S.C. 402(d), provides that when an insured wage earner has died, his or her children are entitled to child's insurance benefits if they were dependent upon the wage earner at the time of death and they satisfy certain other requirements. Under Section 202(d)(3), 42 U.S.C. 402(d)(3), a child is deemed dependent upon the decedent if, at the time of death, the decedent was "living with or contributing to the support of such child." However, a deceased father's child need not make an individualized showing of dependency if (1) the child was the decedent's legitimate child; (2) the child would be entitled to inherit the decedent's personal property under the applicable state intestacy law; (3) the decedent and the child's mother went through a marriage ceremony that would have been valid but for a nonobvious legal defect; (4) the decedent acknowledged in writing that the child was his; (5) a court decreed the decedent to be the child's father; or (6) a court ordered the decedent to support the child because the child was his. *Mathews* v. *Lucas*, 427 U.S. 495, 498-499 & nn. 1-3 (1976) (citing 42 U.S.C. 402(d)(1), 402(d)(3), 416(h)).

2. Petitioner Alice Orsini (Alice) is the mother of Megan Orsini (Megan), an illegitimate child. Megan's father, Michael T. Orsini (Michael), was a fully insured wage earner under the Social Security Act at the time of his death. Pet. App. A4. Michael and Alice were never married and never lived together. Each was self-supporting. *Ibid.* (Alice and Megan took the last name Orsini by means of a name change after Michael's death. *Id.* at A4 n.1.) Megan

was conceived approximately one week before Michael's death; Michael died, without becoming aware of Alice's pregnancy, more than eight months before Megan's birth. *Id.* at A9, F8. After Megan was born, Alice arranged for a paternity test. The test reported a 99.8% likelihood that Michael was Megan's father. *Id.* at A4.

Alice applied for Child's Survivors Insurance benefits on behalf of her daughter. An administrative law judge found that Megan was Michael's biological daughter, but denied the claim because Megan could not satisfy the statute's dependency requirement. Pet. App. A5, F1-F16. After exhausting her administrative remedies, Alice sought judicial review in the United States District Court for the Middle District of Florida. *Id.* at A5-A6. The district court upheld the denial of benefits. The court concluded that none of the presumptions of dependency was applicable and that the evidence established that Michael had not lived with Megan or contributed to her support prior to his death. *Id.* at C7-C13.

3. On appeal, petitioner contended that the statute's dependency provisions discriminate against illegitimate children in violation of the equal protection component of the Fifth Amendment. The court of appeals rejected that contention, finding that the same argument had "already been directly considered and rejected" by this Court in *Mathews* v. *Lucas*, *supra*. Pet. App. A19. *Lucas*, the court of appeals explained, held that the Social Security Act's child dependency presumptions "are reasonably related to the likelihood of dependency at the time of the death of the insured, and, as such, are justified by administrative convenience and do not impermis-

sibly discriminate against children required to prove dependency." Pet. App. A19.[1]

ARGUMENT

Petitioner contends that the dependency provisions of the Social Security Act violate the Fifth Amendment guarantee of equal protection, since they obligate illegitimate children to demonstrate actual dependency in situations in which legitimate children are relieved of that burden. As the court of appeals recognized, however, this Court rejected the same contention in *Mathews* v. *Lucas*, *supra*. There have been no intervening developments that justify reconsidering this issue. Further review is therefore not warranted.

Lucas involved an indistinguishable challenge to the Social Security Act's Child's Insurance Benefits provisions. In that case, the illegitimate children of a deceased wage earner claimed that Congress, at least in cases where paternity was clear, could not constitutionally presume that legitimate children were dependent on their fathers, while requiring illegitimate children to prove their dependency. 427 U.S. at 502. The government responded that the statute was designed "to provide for all children of deceased insureds who can demonstrate their 'need' in terms of dependency at the times of the insureds' deaths" and that the dependency provisions are reasonably related to that objective. *Id.* at 507. This Court sustained the government's position. The Court held that "conditioning entitlement upon de-

[1] The court of appeals also rejected petitioner's claim that Megan had sufficiently established her dependency within the framework of the statute. Pet. App. A7-A18. The petition does not seek further review of that question. Pet. i.

pendency at the time of death is not impermissibly discriminatory," *ibid.*, and that "the statutory classifications are permissible * * * because they are reasonably related to the likelihood of dependency at death," *id.* at 509.

In suggesting that the reasoning of *Lucas* has been undercut by the increased availability of the HLA test as a reliable means of establishing paternity (Pet. 14-15, 19, 20-22), petitioner fundamentally misconceives the statutory scheme and the rationale of *Lucas*. The purpose of the dependency and support provisions is not, as petitioner suggests, "only to determine if the applicant is the child of the wage earner" (*id.* at 15; see *id.* at 9). Paternity alone is insufficient to establish eligibilty for benefits; dependency is also required. The provisions at issue in this case address the latter requirement. As this Court noted in *Lucas*, they embody "reasonable empirical judgments that are consistent with a design to qualify entitlement to benefits upon a child's dependency at the time of the parent's death." 427 U.S. at 510; see *id.* at 515-516.[2] The Act uses a child's legitimacy as one of several indicators of dependency; it does not use dependency as an indicator of paternity. The availability of the HLA test, which allows more reliable determinations of paternity (but not dependency), is thus immaterial to the justification for the Act's support and dependency provisions. Increased

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[2] Indeed, in *Lucas*, the agency determined that the children seeking benefits were biological offspring of the deceased father. 427 U.S. at 500-501. As in this case, the sole issue was whether they satisfied the statute's dependency requirement.

use of the HLA test casts no doubt on the continuing validity of *Lucas*.

For essentially the same reasons, petitioner's reliance (Pet. 25-27) on *Clark* v. *Jeter*, 486 U.S. 456 (1988), and *Pickett* v. *Brown*, 462 U.S. 1 (1983), is misplaced. Both of those cases held that state statutes of limitations applicable to actions *to establish paternity* were unconstitutional. In reaching that conclusion, the Court noted that the availability of scientific means of establishing paternity, including the HLA test, had undercut the relationship between the States' interest in preventing the litigation of stale or fraudulent paternity claims and the challenged statutes of limitations. 462 U.S. at 17-18; 486 U.S. at 464-465. However, in those cases, the ultimate issue was paternity—not, as in this case, dependency. There is thus no conflict between the court of appeals' decision and the decisions in *Clark* and *Pickett*.[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1990

[3] Petitioner also relies upon *Jimenez* v. *Weinberger*, 417 U.S. 628 (1974). In *Lucas*, however, this Court explained at length how the statutory provisions at issue in *Jimenez* are distinguishable from those involved here. 427 U.S. at 511-512.

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